APPENDIX

PROCEEDINGS IN THE COURT BELOW

INDICTMENT

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Count 1.

The Grand Jury charges:

That on or about October 16 and October 17, 1972, in Bell County, in the Eastern District of Kentucky, in the Eastern District of Tennessee, and elsewhere to the Grand Jury unknown, James Eugene Brock, Elmon Middleton and William Edward Alred wilfully and knowingly did combine, conspire, confederate and agree together and with each other and with other persons to the Grand Jury unknown to commit the following offense against the United States: to wilfully receive, conceal, transport and dispose of explosive materials, knowing that such explosive materials were stolen, all in violation of Title 18, Section 842(h), United States Code.

OVERT ACTS

In furtherance of the conspiracy and to effect the objects thereof, the defendants performed the following overt acts:

(1) On or about the 16th day of October, 1972, Elmon Middleton secretly visited the explosives magazine of the Phillips Petroleum Corporation at Wards Chapel in Bell County, Kentucky, for the purpose of determining the quantity, condition, and accessibility of certain explosive material that he intended to assist in stealing

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at some later date.

(2) Elmon Middleton, William Edward Alred, and James Eugene Brock met on October 17, 1972, in Tennessee and drove to a location near the explosives magazine as set out above.

(3) On October 17, 1972, in Bell County, Kentucky, Elmon Middleton, William Edward Alred, and James Eugene Brock jointly possessed a pry bar for the purpose of breaking into the Phillips Petroleum Corporation's explosives magazine and there to steal certain explosive material.

(4) On October 17, 1972, in Bell County, Kentucky, Elmon Middleton, William Edward Alred and James Eugene Brock pried open the locked door of the explosives magazine as before described.

Count 2.

The Grand Jury Further Charges:

That on or about the 17th day of October, 1972, in Bell County, in the Eastern District of Kentucky, James Eugene Brock, Elmon Middleton and William Edward Alred did each, individually and jointly, carry a firearm unlawfully during the commission of the felony crime set out in Count 1 of this indictment for which they may be prosecuted in a court of the United States.

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JURY VERDICT

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The Court: The Clerk will read the verdict, please.

The Clerk: Yes, Your Honor.

London Number 74-7, United States of America vs. William Edward Alred.

We, the Jury, find as to Count 1, guilty; as to Count 2, guilty.

June 17, 1974.

/s/ Vernon Whitis, Foreman.

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OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 74-1972

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

WILLIAM EDWARD ALRED, - - *Defendant-Appellant.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed April 8, 1975.

Before: EDWARDS, PECK and ENGEL, Circuit Judges.

PECK, Circuit Judge. Defendant-appellant was convicted at a jury trial in district court of conspiring to willfully receive, conceal, transport, and dispose of stolen explosive materials, 18 U.S.C. § 842(h) (1970),[1] and of carrying a firearm unlawfully during the commission of a felony, 18 U.S.C. § 924(c) (1970).[2]

[1] "It shall be unlawful for any person to receive, conceal, transport, ship, store, barter, sell, or dispose of any explosive materials knowing or having reasonable cause to believe that such explosive materials were stolen."

[2] "Whoever—

> carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years . . ."

On the instant appeal, appellant argues that the unexplained delay of fifteen (15) months between the commission of the offenses (October 18, 1972) and the indictment charging him with such offenses (January 29, 1974), deprived him of due process particularly where the only trial witness identifying appellant as being involved in the attempted theft of certain explosives identified appellant three days after the offenses (October 21, 1972) as being involved. At least, appellant argues, the district judge erred in refusing to permit defense counsel to elicit from government agents their authority to arrest without a warrant, appellant's theory being that the failure to arrest him, once he had been identified as being involved, would be relevant as showing a lack of governmental belief in his guilt and, consequently, helpful in arguing to the jury that the government had failed to prove his guilt beyond a reasonable doubt.

Although this court originally held that statutes of limitations exclusively control the permissible length of pre-indictment delay (*see, e.g., Lothridge* v. *United States*, 441 F. 2d 919, 922 (6th Cir.), *cert. denied*, 404 U. S. 1003 (1971), *Hoopengarner* v. *United States*, 270 F. 2d 465, 469 (6th Cir. 1959)), this court in *United States* v. *Giacalone*, 477 F. 2d 1273, 1276-1277 (6th Cir. 1973), recognized that, given a sufficiently unexplained pre-indictment delay and sufficient prejudice stemming from such delay, a pre-indictment delay could violate due process.[3]

Even assuming that appellant's failure to raise the pre-indictment delay on a pre-trial motion or at trial[4] did not

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[3]See, e.g., *United States* v. *Marion*, 404 U. S. 307, 324-326 (1971); *Ross* v. *United States*, 349 F. 2d 210 (D.C. Cir. 1965); *United States* v. *Judice*, 457 F. 2d 414, 417-418 (5th Cir.), *cert. denied*, 409 U. S. 886 (1972); *Wilson* v. *United States*, 409 F. 2d 184 (9th Cir.), *cert. denied*, 395 U. S. 983 (1969).

[4]Though defense counsel at trial attempted to argue that the government's delay in arresting appellant reflected a lack of governmental belief in appellant's guilt, counsel apparently never as-

(Footnote continued on following page.)

waive his claim of delay, *see United States* v. *Russo*, 442 F. 2d 498, 502-503 (2d Cir. 1971), *cert. denied*, 404 U. S. 1023 (1972), *United States* v. *Scully*, 415 F. 2d 680, 682 (2d Cir. 1969), *Chapman* v. *United States*, 376 F. 2d 705 (2d Cir.), *cert. denied*, 389 U. S. 881 (1967), *but see Barker* v. *Wingo*, 407 U. S. 514, 524-532 (1972), we find no deprivation of due process in the 15-month delay because appellant did not show substantial delay-caused prejudice. *Giacalone, supra*, at 1276-1277; *United States* v. *Davis*, 487 F. 2d 112, 116 (5th Cir. 1973), *cert. denied*, 415 U. S. 981 (1974); *United States* v. *Feldman*, 425 F. 2d 688, 691-692 (3rd Cir. 1970); *United States* v. *Baker*, 424 F. 2d 969, 970 (4th Cir. 1970); *United States* v. *Deloney*, 389 F. 2d 324, 325 (7th Cir.), *cert. denied*, 391 U. S. 904 (1968); *United States* v. *Feinberg*, 383 F. 2d 60, 65-67 (2d Cir. 1967), *cert. denied*, 389 U. S. 1044 (1968). See *United States* v. *Strauss*, 452 F. 2d 375, 377-378 (7th Cir. 1971), *cert. denied*, 405 U. S. 989 (1972).

Appellant claims prejudice in that the delay prevented him from preserving "his memory and [that of] those around him on the night in question." The trial transcript, however, reveals that appellant paraded no fewer than six alibi witnesses who testified they were in appellant's residence the night he received a telephone call informing him that one Eugene Brock "had just got shot in Bell County." Appellant argued that, because Brock was shot in the attempted theft of explosives underlying the government's charges, because appellant was in his residence the evening and night the alibi witnesses first learned of the shooting of Brock, and because in the "small rural communities in East-

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(Footnote continued from preceding page.)

serted that due process requires that the indictment be dismissed for prejudicial pre-indictment delay. On oral argument in this court, counsel asserted that he failed to raise the pre-indictment delay earlier because the lack of jurisdiction for the delay was "not readily evident;" only at trial, counsel claimed, he learned that appellant was identified as being involved three days after the commission of the offenses.

ern Kentucky" had Brock been shot on a prior night the alibi witnesses would have had previously heard of the shooting, he could not have been involved in the attempted theft.

Although the government's case-in-chief indicated the offenses occurred on October 17, 1972, the government, in rebuttal, produced state police records indicating that the attempted break-in occurred on October 18, 1972. Unfortunately, the government discovered the error only after the testimony of the six alibi witnesses. Even assuming that the alibi witnesses would have been able to have dated the telephone call as being October 18, 1972, had appellant been more timely indicted, we fail to see substantial prejudice to his alibi defense since the alibi witnesses recalled, in great detail, the telephone call and the events surrounding it. Three of the witnesses, in fact, were unable to recollect whether appellant received the call on October 16, 17, or 18, or even just sometime in October, 1972. Another witness originally was unable to recall the date as being October 17. Even though that witness, and two others, eventually testified, on direct or re-direct examination, that appellant received the call on October 17 such error is immaterial. The crux of their testimony, and all that the jury need believe to establish the alibi, was that appellant—at home all evening and night—received a telephone call, informed the alibi witnesses that Brock had just been shot, and they, at that time, had never heard of the Brock shooting. In essence, the telephone call, rather than the calendar, dated their testimony.

We also reject appellant's claim, without citing authority, that the district judge erred in refusing to permit him to elicit that government agents, although having the authority to arrest on probable cause without a warrant, failed to arrest him prior to the indictment. Purportedly, such failure would reflect the agents' lack of belief in appel-

lant's guilt and would be relevant in the jurors' determination of appellant's guilt. *Hoffa* v. *United States*, 385 U. S. 293, 310 (1966), established that

> "[t]here is no constitutional right to be arrested. The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect. . . . Law enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause, a quantum of evidence which may fall far short of the amount necessary to support a criminal conviction."

Under such circumstances, and in the absence of authority, *but see, United States* v. *Sanchez*, 361 F. 2d 824 (2d Cir. 1966), we decline to hold that the district judge abused his discretion, *United States* v. *Dollers*, 408 F. 2d 918, 922 (6th Cir.), *cert. denied*, 395 U. S. 943 (1969), *United States* v. *Craft*, 407 F. 2d 1065, 1070 (6th Cir. 1969), in excluding such evidence. *See People* v. *Garcia*, 7 Ill. App. 3d 742, 288 N. E. 2d 637, 641 (1972) (no error in refusing to admit evidence that state previously had nolle prosse burglary charge). *See also Alexander* v. *Commonwealth*, 450 S. W. 2d 808, 810-811 (Ky. 1970).

Affirmed.

TESTIMONY IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY, AT LONDON, KENTUCKY

EXCERPTS FROM TESTIMONY OF PARIS HOSKINS

86

Q. Did you see anybody pry a lock off?

A. The lock hadn't been pried off the cable, no.

Q. Well, I'm not asking you if it had or hadn't, Mr. Hoskins. I'm just asking you did you see anyone of these three alleged people attempt to pry off a lock?

A. No, sir.

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Q. Twenty (20') feet, about as close at the two of us?

A. Uh huh.

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Q. All right, Mr. Hoskins, do you know the defendant, Rube Alred? I think you have testified that you do.

A. I do.

Q. How long have you known him?

A. I'd say, four or five (4-5) years.

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Q. How often would you be in there and how often would you see Mr. Alred in 1969 and 1970?

A. Well, the years that I worked for Mr. Haywood—let's put it that way—I don't know whether it was 1969, '70, or '71, whatever year it was, but when I worked for him sometimes I would see Mr. Alred every day. Every time I would come in he was there.

Q. How many people did Mr. Haywood have working for him at that time?

A. He had several people.

Q. Ten or fifteen?

A. I'd say, I don't know.

Q. How many did you come in contact with? That's what I'm trying to obtain, Mr. Hoskins.

A. I come in contact with most of them that worked there, but a lot of them I didn't know, because it was a pretty good size operation.

Q. You had enough frequent association with Mr. Alred that you would know him if you met him on the street, did you not?

A. Yes, sir.

Q. As a matter of fact, you have had coffee in

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his house, haven't you?

A. I have been in his house, yes, sir.

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Q. And you're telling this jury that a man you have known since 1969 walked by approximately twenty (20') feet where you were in a trailer, and you did not recognize him as Mr. Rube Alred, is this correct?

108

A. Yes, sir.

EXCERPTS FROM TESTIMONY OF TRUMAN HAYS

161

Q. Do you mean to tell the jury that you didn't know who it was that night, you just recognize him now as being that man that night?

A. Yes, sir, that's correct.

Q. Okay. Now, when was it you first found out this fellow's name?

A. About three (3) days later when I picked him out of some mug shots.

Q. This was three days later?

A. Approximately.

Q. What year would that be in?

A. Three days later, it was right after the 18th of October.

Q. Was it the 18th of October now, or the 17th? The 17th, wasn't it?

A. The 17th.

EXCERPTS FROM TESTIMONY OF
LOGAN MIDDLETON

203

Q. Would you tell the Court and Jury, please, whether or not you can recall anything out of the ordinary happening to Mr. Brock on or about October 17th, 1972?

A. I recall hearing of him being shot.

The Court: Sustained.

Do you know of your own knowledge what happened to him?

A. No, sir, I don't.

EXCERPTS FROM TESTIMONY OF
OSCAR HAYWOOD

217

Q. Do you know the defendant, Mr. Alred?

A. Yes, sir.

Q. Do you know Eugene Brock?

A. I know him a little bit.

Q. Do you recall October 17th, 1972, if you do remember this date, will you tell us if you remember being at the home of Mr. Alred?

A. Yes, sir, I do.

Q. Tell this Jury here what time you got to Mr. Alred's home?

A. It was approximately 10:00 o'clock, or maybe

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11:00. Somewhere around there.

I've got a garage that Mr. Alred lives behind my garage and I park my trucks around there. We have ten or twelve trucks, and we use that for a parking lot back there. Every night before I go to bed I walk around behind this garage. Sometimes there's fellows goes around there and drinks beer. It's back where not too many people live, and I walk around there to see if anybody is parked around there, and sometimes I have to tell them to leave. Sometimes they get in the trucks and bother the drivers' personal property.

And I walked around there this night, and every once in a while I will walk into Rube's house. He lives one house from the parking lot. And I walked in this house that night and Rube and I, and another fellow by the name of Bill—I don't know his name, but we were sitting at Rube's kitchen table when his little girl answered the telephone, and she told him somebody wanted him on the telephone, and when Rube came back he said that Gene Brock had been shot; said he got both of his legs shot off.

And that's just about it.

Q. Who all was there?

A. Rube's brother-in-law was there, Perry Fowler.

Q. Where were you when this telephone call came

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for Mr. Alred here?

A. We were sitting in Rube's kitchen at the table.

Mr. Roberts: That's all.

The Court: Cross-examine.

Cross-examination

By Mr. Kirkland:

Q. Mr. Haywood, you don't know that this occurred on

October 17th? It could have been on the 18th or the 19th, couldn't it?

A. All I know he came back in there and he said Gene Brock had just got shot. The exact date, I wouldn't be sure, but he said Gene Brock had just got both legs shot off.

Q. So if you were there when this telephone call came in, so far as you know the telephone call could have been the day after he got shot, or two days?

A. That's right.

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221

Re-Direct Examination

By Mr. Roberts:

Q. This evening that you were there, Mr. Haywood, is that the first time that you had ever heard about Gene Brock getting shot anywhere?

A. That's right.

EXCERPTS FROM TESTIMONY OF PENNY ALRED

222

Q. Now, do you recall on or about October 17th, 1972 receiving a telephone call at your house? Do you live with your father?

A. Yes, I do.

Q. Do you recall getting a telephone call there at the house?

A. Yes.

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Q. What, if anything, did he say after he had answered the telephone?

A. Well, I heard him say: "Well, I'll be damned."

And then when he hung up, Mom asked him what happened —Mom asked him "What's wrong"? And he said Gene Brock just

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got shot in Bell County, and that's all I heard him say.

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Q. Could this have been in December instead of at some other time?

A. I really don't know when it could have been. I know I was at home the night I received the phone call.

Q. And you know you had been to school that day?

A. Yes.

Q. Could it have been just before Christmas?

A. It could have been. I'm not for sure.

Q. So, you don't know whether the phone call came on October 17th or not, do you?

A. No, all I know I was there when the phone call came.

Q. All right. It could have been October 18th, is that right?

A. It could have been.

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Q. Had you ever heard of Gene Brock ever being shot before your father told you that night?

A. No, sir.

EXCERPTS FROM TESTIMONY OF GENEVA ROSKIE

234

Q. Then what did you do?

A. I brought him back to Mr. Alred's house and went in and had a cup of coffee with them, and I was sitting there

talking to Miss Alred when the phone rung, and the daughter answered the phone, and Mr. Alred was eating supper, him and Mr. Fowler, and the daughter said: "Daddy, the phone call is for you."

Q. Go ahead.

A. And when Mr. Alred took the phone, he said Gene Brock had just been shot.

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Q. All right. Do you recall what day of the month it was on?

A. No, I don't. It was in October of 1972, but I don't remember the date.

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Re-Direct Examination

By Mr. Roberts:

Q. Mrs. Roskie, had you ever heard of Eugene Brock being shot before this particular night when Mr. Alred answered the telephone and related to you and the people who were there that Mr. Brock had just been shot?

A. No, sir, I hadn't.

EXCERPTS FROM TESTIMONY OF PAULINE ALRED

301

Q. Now, do you recall the evening of October 17th, 1972?

A. Yes, sir, I do.

Q. All right. Now, before you go into what happened that evening, I want you to tell how you are able to remember whether or not we're talking about October 17th? How do you know it was October 17th?

A. Well, on a Monday, that was the 16th, they come a rain, and I had a leak that come in my living room. So, my husband told me to go to Pope and Cawood, that's in Harlan, and get a roll of roofing, and I needed a roll of insulation, and I needed a piece of paneling where we were remodeling the house, and I went and got it and I have this here.

(Reporter's note: Witness holds up a piece of paper).

Q. What day did you go to the lumber company?

A. On October 17th, 1972, on a Tuesday.

Q. Did you make a purchase of these things?

A. Yes, sir, I paid for them and they delivered

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them.

Q. And on what day did they deliver them?

A. On the same day.

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Q. What you heard Rube say.

A. He said: "Well, I'll be damned." So when he talked a few more minutes and he hung up, I asked him, I said: "Rube, what was wrong?" By him saying that, I asked him what was wrong, and he said Gene Brock just got shot in Bell County. He went on to the kitchen and he told Oscar and my brother that Gene Brock had just got shot in Bell County, and my brother asked who was Gene Brock, and I said: "Perry, it's the one that used to date our oldest sister."

EXCERPTS FROM TESTIMONY OF GENE BROCK, CO-DEFENDANT

339

Q. Mr. Brock, I want you to tell this Court and this Jury whether or not you have always maintained, since the

night in question that this crime was committed, that Mr. Alred was in no way involved?

A. Mr. Alred—I hadn't even seen Mr. Alred. I had been run out of Kentucky, and that was the first time I had been back in Kentucky. I had been out in Ohio and come back down in Tennessee, and I hadn't even seen Mr. Alred until we was down here in court.

EXCERPTS FROM TESTIMONY OF ROBERT COMBS

349

Q. Oh, by the way, what day was this on?

A. I'm not certain of the day, but it was the 18th of October. I think it was a Wednesday, I'm not sure.

Q. So, if the shooting took place at about 10:15 P.M. on October 18th, would there be any way the people in Harlan could know about it at 9:30 on the 17th?

EXCERPTS FROM TESTIMONY OF JACK HOWARD AND JOHNNY CREECH, KENTUCKY STATE POLICE

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Q. Did you receive a call around 10:00 o'clock or a little after on October 18, 1972 with regard to a potential break-in in Bell County?

A. Yes, sir.